Law Kian Ming v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-05(M)-587–12 OF 2019 AND W-05(M)-588–12 OF 2019
VAZEER ALAM, ABU BAKAR JAIS AND HASHIM HAMZAH JJCA
7 APRIL 2023

Evidence — Statement — Statement under s 112 of Criminal Procedure Code — Appellants convicted for offence of trafficking in dangerous drugs — Appellants sentenced to mandatory death — High Court rejected appellants' application for production of statements of witnesses pursuant to s 112 of Criminal Procedure Code ('s 112 statement') — Witnesses were offered by prosecution to defence — Witnesses were not made available for defence — Whether failure to produce witnesses prejudiced appellants' rights to fair trial — Whether refusal of prosecution to provide s 112 statement prejudiced appellants' rights to fair trial — Whether High Court's order in rejecting appellants' application for copies of s 112 statements recording from witnesses prejudiced their rights to fair trial — Criminal Procedure Code s 112 — Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a) & (2) — Evidence Act 1950 s 114(g) — Penal Code s 34

The first appellant and the second appellant were jointly charged for trafficking in dangerous drugs pursuant to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read together with s 34 of the Penal Code, an offence punishable under s 39B(2) of the Act. The prosecution's case was based on the evidence of the police officers ('SP1' and 'SP5') who had raided a hotel ('the hotel') located in Bukit Bintang Kuala Lumpur based on the information given by the Taiwan Bureau of Justice Investigation. The police officers had arrested the first appellant at the lobby of the hotel whereas the second appellant was arrested in room 209 of the hotel. Aside from the appellants, the police officers had also arrested the first appellant's wife ('SD3') and also two Taiwanese men by the names of Chen Heng Tai and Lin Wen Hua. During the raid, there was nothing incriminating found by the police officers but the following day, after SP5 obtained the key to room 203 from the receptionist of the hotel known as Ms Roxan and conducted a search in the said room, the police officers found two trolley bags ('P16' and 'P17') containing the drugs which formed the subject matter of the charge. The prosecution had also relied on the CCTV recording showing that the first appellant had entered room 203 on two occasions on the day of the raid whereas the second appellant was seen carrying one of the bags to room 203. In defence, the first appellant contended that he entered room 203 because Chen Heng Tai who had occupied the room complained to Roxan that the TV in the said room was not working and acted on that, the first appellant who was in charge with the operations side of the hotel had entered the room to check and fix the TV cable. As for the second appellant, it was

contended that he carried P16 at the behest of Chen Heng Tai. At the end of the case, the High Court judge found that the appellants had failed to rebut the presumption of trafficking under s 37(da) of the Act and failed to raise reasonable doubt on the prosecution's case. Consequently, the appellants were convicted and sentenced to mandatory death, hence, the present appeals. The appellants argued that the prosecution had failed in its duty to promote a fair trial to the severe prejudice of the appellants. In relation to this argument, the appellants submitted that the conduct of the prosecution in failing to make four important witnesses (namely Raxon, Sia Oh Bong, Chen Heng Tai and Lin Wen Hua) available to appear in court as witnesses who had been offered by the prosecution to the defence, as well as the refusal of the prosecution to provide the s 112 of Criminal Procedure Code statements ('s 112 statement(s)') of these persons and the corresponding rulings made by the learned trial judge rejecting the appellants' application for copies of s 112 statements recording from these witnesses had prejudiced their rights to a fair trial.

Held, allowing the appeals, setting aside the order of the High Court and acquitting and discharging the appellants:

(1) The production of Roxan's s 112 statement had probative value for the defence in that it could have: (a) corroborated the first appellant's testimony that it was the first appellant who instructed her to give the key to room 203 to Chen Heng Tai; (b) corroborated the first appellant's version that Chen Heng Tai of room 203 had complained to her that the TV in the room was not functioning and that she had informed the first appellant about it; and (c) consequently, negated possession of the drugs or common intention between him and the second appellant to commit the offence. The court therefore found that the prosecution's refusal to give the s 112 statement to the defence and the High Court's dismissal of the defence application for the production of the same had severely prejudiced the defence, and the appellants had been deprived of a fair trial (see paras 25–26).

(2) In relation to Sia Oh Bong, the learned trial judge ruled that the defence was not entitled to the s 112 statement based on the Federal Court's pronouncement in *Husdi v Public Prosecutor* [1979] 2 MLJ 304 ('*Husdi*'s case'). However, the court agreed with the first appellant that *Husdi*'s case could be distinguished in that unlike *Husdi*'s case where the application for s 112 statement were made before trial for witnesses who were not offered by the prosecution, in the present case, Sia Oh Bong was a witness offered by the prosecution to the defence at the close of prosecution case, and could not be located by the prosecution. When an application for the s 112 statement was made at the close of the prosecution's case or at the defence stage, such an application could be considered and allowed by the court especially if any witnesses offered by the prosecution could not be located or subpoenaed to attend court (see paras 27–28 & 32).

(3) The suggestions by the defence that the masterminds behind the drugs were Lin Wen Hua and Chen Heng Tai, and that Chen Heng Tai had taken room 203 as an additional room in which the drugs were found were never effectively dispelled by the prosecution and both of them were sent back to Taiwan without even an attempt to bring them back to Malaysia to testify at the trial. There was uncontroverted evidence that statements were recorded from these persons by the police, but these statements were not produced by the prosecution to close these gaps in the case for the prosecution. Neither were these statements tendered or supplied to the defence, even when the above four persons who were important witnesses for the defence were unavailable in Malaysia. The failure of the prosecution to provide these statements to the defence and the refusal of the trial court to order their production had severely prejudiced the defence and denied the appellants their right to a fair trial (see paras 38–40).

(4) If the appellants, and in particular the first appellant had been occupying room 203, then surely their fingerprint would have been found on the two luggage bags and other items in the room that any hotel guest would have ordinarily used. However, none were found. Further, the momentary custody of luggage bag P16 by the second appellant by taking it into room 203 and living it there without any further contact with until it was found and seized by the police two days later was not sufficient to prove the basic elements of custody and control, let alone knowledge of the drugs inside the bags (see paras 42 & 44).

(5) Based on the above findings, the court agreed with the appellants that the learned trial judge had misdirected himself in dismissing the explanation of the appellants and dismissing their application for the production of the s 112 statements of these four persons, and in failing to invoke adverse inference against the prosecution for not producing Chen Heng Tai, and/or the other three persons or their s 112 statements. Therefore, in totality, the court held that the conviction of the appellants was not safe (see paras 47–48).

[Bahasa Malaysia summary

Perayu pertama dan perayu kedua didakwa bersama atas kesalahan mengedar dadah berbahaya menurut s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dibaca bersama s 34 Kanun Keseksaan, suatu kesalahan yang boleh dihukum di bawah s 39B(2) Akta tersebut. Kes pendakwaan adalah berdasarkan keterangan pegawai-pegawai polis ('SP1' dan 'SP5') yang telah menyerbu sebuah hotel ('hotel tersebut') yang terletak di Bukit Bintang Kuala Lumpur berdasarkan maklumat yang diberikan oleh Taiwan Bureau of Justice Investigation. Pegawai-pegawai polis telah menahan perayu pertama di lobi hotel manakala perayu kedua ditahan di bilik 209 hotel tersebut. Selain perayu-perayu, polis juga telah menahan isteri perayu pertama ('SD3') dan

juga dua lelaki warga Taiwan bernama Chen Heng Tai dan Lin Wen Hua. Semasa serbuan, tiada apa-apa yang meragukan ditemui oleh anggota polis tetapi keesokan harinya, selepas SP5 mendapatkan kunci bilik 203 daripada penyambut tetamu hotel yang dikenali sebagai Cik Roxan dan melakukan pemeriksaan di bilik tersebut, anggota polis menemui dua beg troli ('P16' dan 'P17') yang mengandungi dadah yang menjadi perkara pertuduhan ini. Pihak pendakwaan juga bergantung kepada rakaman CCTV yang menunjukkan perayu pertama telah memasuki bilik 203 sebanyak dua kali pada hari serbuan manakala perayu kedua dilihat membawa salah satu beg tersebut ke bilik 203. Dalam pembelaan, perayu pertama berhujah bahawa dia memasuki bilik 203 kerana Chen Heng Tai yang telah menduduki bilik tersebut mengadu kepada Roxan bahawa TV di bilik tersebut tidak berfungsi dan bertindak atas perkara tersebut, perayu pertama yang bertanggungjawab di bahagian operasi hotel tersebut telah memasuki bilik tersebut untuk memeriksa dan memperbaiki kabel TV. Bagi perayu kedua pula, dia mendakwa bahawa dia membawa P16 atas arahan Chen Heng Tai. Pada akhir kes, hakim Mahkamah Tinggi mendapati bahawa perayu-perayu telah gagal untuk menyangkal anggapan pengedaran di bawah s 37(da) Akta tersebut dan gagal menimbulkan keraguan munasabah ke atas kes pendakwaan. Akibatnya, perayu-perayu telah disabitkan bersalah dan dijatuhkan hukuman mati mandatori, justeru, rayuan-rayuan semasa. Perayu-perayu berhujah bahawa pihak pendakwaan telah gagal dalam tugasnya untuk memberikan perbicaraan yang adil yang mengakibatkan prejudis teruk ke atas perayu. Berhubung dengan hujah ini, perayu-perayu berhujah bahawa kelakuan pihak pendakwaan yang gagal menyediakan empat saksi penting (iaitu Raxon, Sia Oh Bong, Chen Heng Tai dan Lin Wen Hua) untuk hadir di mahkamah sebagai saksi-saksi yang ditawarkan oleh pendakwaan kepada pihak pembelaan, serta keengganan pihak pendakwaan untuk membekalkan pernyataan di bawah s 112 Kanun Tatacara Jenayah ('pernyataan s 112') oleh orang-orang ini dan keputusan serupa yang dibuat oleh hakim bicara yang bijaksana yang menolak permohonan perayu-perayu untuk mendapatkan salinan pernyataan s 112 yang direkodkan daripada saksi-saksi ini telah menjejaskan hak mereka untuk perbicaraan yang adil.

Diputuskan, membenarkan rayuan-rayuan, mengenepikan perintah Mahkamah Tinggi dan melepaskan dan membebaskan perayu-perayu:

(1) Pengemukaan pernyataan s 112 Roxan mempunyai nilai probatif untuk pembelaan kerana ia boleh: (a) menguatkan keterangan perayu pertama bahawa perayu pertama yang mengarahkannya untuk memberikan kunci bilik 203 kepada Chen Heng Tai; (b) menyokong versi perayu pertama bahawa Chen Heng Tai dari bilik 203 telah mengadu kepadanya bahawa TV di dalam bilik tersebut tidak berfungsi dan bahawa dia telah memaklumkan perayu pertama mengenainya; dan (c) akibatnya, menafikan pemilikan dadah atau niat bersama antara dia dan perayu

kedua untuk melakukan kesalahan tersebut. Oleh itu mahkamah mendapati bahawa keengganan pihak pendakwaan untuk membekalkan pernyataan s 112 kepada pembelaan dan penolakan Mahkamah Tinggi terhadap permohonan pembelaan untuk mengemukakan perkara yang sama telah menjejaskan pembelaan dengan teruk, dan perayu-perayu telah dinafikan perbicaraan yang adil (lihat perenggan 25–26).

(2) Berhubung dengan Sia Oh Bong, hakim bicara yang bijaksana memutuskan bahawa pihak pembelaan tidak berhak untuk mendapatkan pernyataan s 112 berdasarkan keputusan Mahkamah Persekutuan dalam *Husdi v Public Prosecutor* [1979] 2 MLJ 304 ('kes *Husdi*'). Bagaimanapun, mahkamah bersetuju dengan perayu pertama bahawa kes *Husdi* boleh dibezakan kerana tidak seperti kes *Husdi* di mana permohonan untuk pernyataan s 112 dibuat sebelum perbicaraan bagi saksi-saksi yang tidak ditawarkan oleh pihak pendakwaan, dalam kes ini, Sia Oh Bong adalah seorang saksi yang ditawarkan oleh pihak pendakwaan kepada pihak pembelaan pada penutupan kes pendakwaan, dan dia tidak dapat dikesan oleh pihak pendakwaan. Apabila permohonan untuk pernyataan s 112 dibuat pada penutupan kes pendakwaan atau di peringkat pembelaan, permohonan sedemikian boleh dipertimbangkan dan dibenarkan oleh mahkamah terutamanya jika mana-mana saksi yang ditawarkan oleh pihak pendakwaan tidak dapat dikesan atau disepina untuk hadir ke mahkamah (lihat perenggan 27–28 & 32).

(3) Cadangan oleh pihak pembelaan bahawa dalang di sebalik dadah tersebut ialah Lin Wen Hua dan Chen Heng Tai, dan bahawa Chen Heng Tai telah mengambil bilik 203 sebagai bilik tambahan di mana dadah tersebut ditemui tidak pernah dipatahkan dengan berkesan oleh pihak pendakwaan dan kedua-dua mereka dihantar pulang ke Taiwan tanpa apa-apa percubaan untuk membawa mereka kembali ke Malaysia untuk memberi keterangan dalam perbicaraan. Terdapat keterangan yang tidak dipertikaikan bahawa pernyataan telah direkodkan daripada orang-orang ini oleh pihak polis, tetapi pernyataan ini tidak dibekalkan oleh pihak pendakwaan untuk menutup jurang dalam kes bagi pihak pendakwaan. Pernyataan ini juga tidak dikemukakan atau dibekalkan kepada pihak pembelaan, walaupun empat orang di atas yang menjadi saksi-saksi penting bagi pembelaan tidak ada di Malaysia. Kegagalan pihak pendakwaan untuk membekalkan pernyataan-pernyataan ini kepada pihak pembelaan dan keengganan mahkamah bicara untuk memerintahkan pengemukaannya telah memudaratkan pihak pembelaan dengan teruk dan menafikan hak perayu-perayu untuk mendapatkan perbicaraan yang adil (lihat perenggan 38–40).

(4) Jika perayu-perayu, dan khususnya perayu pertama telah menduduki bilik 203, maka sudah pasti cap jari mereka akan ditemui pada dua beg

bagasi dan barang-barang lain di dalam bilik tersebut yang biasanya digunakan oleh mana-mana tetamu hotel. Bagaimanapun, tiada langsung yang ditemui. Selanjutnya, penjagaan sementara beg bagasi P16 oleh perayu kedua dengan membawanya ke dalam bilik 203 dan meninggalkannya di sana tanpa apa-apa tindakan yang lain sehingga ianya ditemui dan dirampas polis dua hari kemudian tidak mencukupi untuk membuktikan elemen asas jagaan dan kawalan, apatah lagi pengetahuan tentang dadah di dalam beg tersebut (lihat perenggan 42 & 44).

(5) Berdasarkan dapatan-dapatan di atas, mahkamah bersetuju dengan perayu-perayu bahawa hakim bicara yang bijaksana telah tersalah arah dirinya dalam menolak penjelasan perayu-perayu dan menolak permohonan mereka untuk dibekalkan pernyataan s 112 bagi empat orang ini, dan dalam kegagalan untuk membuat anggapan bertentangan terhadap pihak pendakwaan kerana tidak mengemukakan Chen Heng Tai, dan/atau tiga orang lain atau pernyataan s 112 mereka. Oleh itu, secara keseluruhannya, mahkamah memutuskan bahawa sabitan perayu-perayu adalah tidak selamat (lihat perenggan 47–48).]

Cases referred to

Aedy bin Osman v PP [2018] supp MLJ 353; [2011] 1 CLJ 273, FC (refd)
Husdi v PP [1979] 2 MLJ 304 (distd)
Kobra Taba Seidali v PP [2014] 2 MLJ 554; [2014] 2 CLJ 12, CA (refd)
Masoumeh Gholami Khaveh v PP [2013] 5 MLJ 688; [2013] 5 CLJ 59, CA (refd)
Ooi Chee Seong & Anor v PP [2014] 3 MLJ 593; [2014] 7 CLJ 505, CA (refd)
PP v Asnawi bin Yusuf [2011] 4 MLJ 16, CA (refd)
Pragalathan a/l Balakrishnan v PP [2018] 3 MLJ 818; [2018] 2 CLJ 420, CA (refd)
Rosli bin Yusof v PP [2021] 4 MLJ 479; [2021] 7 CLJ 681, FC (refd)
Siti Aisyah v PP [2019] 4 MLJ 46; [2019] 7 CLJ 27, CA (refd)
Warner v Metropolitan Police Commissioner [1969] 2 AC 256, HL (refd)

Legislation referred to

Criminal Procedure Code ss 112, 118
Dangerous Drugs Act 1952 ss 2, 37(da), 39B(1)(a), (2), First Schedule
Evidence Act 1950 s 114(g)
Federal Constitution art 5(1)
Penal Code s 34

Appeal from: Criminal Trial No WA-45A–12–03 of 2018 (High Court, Kuala Lumpur)

Hisyam Teh Poh Teik (with Low Wei Loke) (Hisyam Teh); Gooi Soon Seng (with

Choong Kak Sen) (Gooi & Azura) for the appellant.
Mohd Zain bin Ibrahim (with Muhammad Azmi bin Mashud) (Selangor State Legal Advisor's Office) for the respondent.

Vazeer Alam JCA (delivering judgment of the court):

INTRODUCTION

[1] Law Kian Ming ('first appellant') and Dong Jhen Yu ('second appellant') were jointly charged and found guilty of trafficking in 24,281.9g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read together with s 34 of the Penal Code ('the PC') that is punishable under s 39B(2) of the Act. Upon conviction, both appellants were sentenced to mandatory death.

THE CHARGE

[2] The charge against the appellants read:

> Bahawa kamu bersama-sama pada 20.08.2016 jam lebih kurang 2.55 pagi, di bilik No. 203, Victory Exclusive Hotel, B7 & B8, Blok 8, Ferenheit 88, 179 Jalan Bukit Bintang, di dalam Daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 24,281.9 gram, oleh yang demikian kamu telah melakukan suatu kesalahan dibawah seksyen 39(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

[3] The appellants appealed against conviction and sentence, and we allowed both appeals for the reasons stated below.

PROSECUTION'S CASE

[4] The essence of the prosecution's case is well summarised by the learned trial judge in his grounds of judgment, and the salient facts as found by the learned trial judge are as follows.

[5] Acting on information received from the Taiwan Bureau of Justice Investigation, Insp Muhammad Zaidi bin Said @ Zaid (SP5) instructed a team of police officers to proceed to the vicinity of Victory Exclusive Hotel ('the hotel') at Jalan Bukit Bintang, Kuala Lumpur, to keep observation for a white Mercedes Benz car bearing registration number WPV68 ('the car').

[6] After a while, Kpl Mohd Fauzi bin Hassan (SP1), a member of the team, had observed the first appellant driving the car and parking it outside the hotel

at about 7.30pm on 18 August 2016. The second appellant was also seen seated in the car. SP1 relayed the information to SP5. SP1 then saw both appellants alighting from the car and going into the hotel. At about 10pm the second appellant came out from the hotel. He headed to the car and from the car boot he took out a brown trolley luggage bag (P16). The second appellant brought P16 to room 201 of the hotel, which was occupied by the first appellant.

[7] Some five minutes later, the second appellant was once again seen coming out from the hotel and going to the boot of the car. This time he took out a maroon hand luggage bag (P18) from the car boot and took it to room 201.

[8] The following day, ie on 19 August 2016, at about 10.30pm, after about 30 minutes of observation outside the hotel, a team of police officers led by SP5 raided the hotel and arrested the first appellant at the hotel lobby, whilst the second appellant was arrested in room 209. Apart from the appellants, three other persons, namely a Malaysian woman by the name of Kelly Chia Huey Mian ('Kelly Chia'), and two Taiwanese men by the names of Chen Heng Tai and Lin Wen Hua were also arrested at Level 2 of the hotel. Kelly Chia is the wife of the first appellant, and later became a defence witness (SD3).

[9] The police team conducted a body search of all the arrested persons, and also searched rooms 201, 202, 209 and 211 but nothing incriminating was found. Subsequently, SP5 and his raiding team brought all the arrested persons, except Kelly Chia, to a shop at Bandar Damansara Perdana. Again nothing incriminating was found at the said shop.

[10] The arrested persons were detained for investigations, and on the following day, ie 20 August 2016 at about 2.55am, SP5 and the raiding team returned to the hotel with the arrestees. Upon arrival, SP5 obtained the key to room 203 from the receptionist, one Ms Roxan, and inspected the room. All the arrested persons were meanwhile kept in another room.

[11] In room 203, the police team found two trolley luggage bags (P16 and P17). In P16 (Hush Puppies brand) there were 11 transparent plastic packets, whilst in P17 (Pierre Cardin brand) there were 32 transparent plastic packets containing illicit drugs which are the subject matter of the charge. SP5 had testified that when he first entered room 203 he saw one of the bags open and in it were plastic packets containing the drugs. There was also an electronic scale and sealer found in the said room.

[12] The prosecution produced a CCTV recording in court, which was analysed by two expert witnesses from Cyber Security Malaysia, ie Abdul Wafi bin Abdul Rahman (SP7) and Mohd Sharizuan bin Mohd Omar (SP9). The

CCTV recording for 18 August 2016 showed the first appellant carrying P18 and the second appellant carrying P16 from room 201 into room 203. Subsequently, the recording for 19 August 2016 showed the first appellant entering room 203 on two occasions. SP6 further testified that prior to his arrest the second appellant in room 209, the second appellant had attempted to flee.

[13] En Mohd Azhan bin Md Deros (SP4), an officer from the Chemistry Department Malaysia confirmed that the substances found in the transparent plastic packets were methamphetamine weighing 24,281.9g. Methamphetamine is listed in the First Schedule of the Act and as such is a dangerous drug as defined in s 2 of the Act.

THE HIGH COURT'S FINDINGS

[14] At the close of the prosecution's case, the learned High Court judge found that a prima facie case had been made out against both appellants. The learned judge found that the prosecution had proved possession and knowledge of the drugs in P16 and P17 by way of direct evidence. The High Court further applied the presumption of trafficking under s 37(da) of the Act by virtue of the weight of the drugs being above the statutorily prescribed minimum amount. The High Court also found that the element of common intention under s 34 of the PC had been established.

[15] In defence, both appellants elected to give sworn testimony and also called SD3 as a witness on their behalf. The first appellant's defence was in summary, that:

(a) he helped in the operations side of the hotel, of which his wife (SD3) was a co-owner, and at all material times he occupied room 201;

(b) he was arrested in the hotel lobby at about 10pm on 18 August 2016, and apart from him, three other Taiwan nationals were also arrested;

(c) a search was done in room 201 but nothing incriminating was found;

(d) the first appellant and the three Taiwanese were brought to a shophouse in Damansara Perdana where a search was conducted, but nothing incriminating was found;

(e) they were then brought back to the hotel and held in room 002. About ten minutes later they were taken to room 203 where the drugs were found. The drugs were in two bags, P16 and P17;

(f) on 16 August 2016, one of the other Taiwanese, Chen Heng Tai, had asked for an additional room and the first appellant had asked Roxan, the receptionist on duty, to give him room 203;

(g) he had on 18 August 2016 helped the second appellant to bring the hand carry bag (P18) to room 203;

(h) on 19 August 2016 he had entered room 203 on two occasions. The first was at about 2.15pm after Roxan had informed him that Chan Heng Tai had complained to her that the TV in room 203 was not functioning. He entered the room to check the TV and discovered that there was a problem with the TV cable. Then at about 9.40pm he re-entered room 203 to repair the TV cable. He then went to the lobby and a short while thereafter arrested by the police;

(i) he did not have any knowledge of the presence of drugs in both P16 and P17 and consequently was not in possession of the drugs;

(j) both the appellants were detained under LLPK preventive detention after their arrests and were in detention for 17 months before being charged with the present offence of trafficking in dangerous drugs; and

(k) the actual traffickers of the drugs were the Taiwanese, Lin Wen Hua and Chen Heng Tai, who were also arrested together with the appellants;

[16] As for the second appellant, in addition to the defence raised by the first appellant, he also contended that there was no direct evidence to implicate and connect the second appellant who was arrested in room 209 whilst the impugned drugs were found in room 203.

[17] Having considered the defence case, and the evidence in its totality, the learned trial judge found that the appellants had failed to rebut the presumption of trafficking in s 37(da) of the Act on a balance of probabilities. The High Court judge further found that the appellants had also failed to raise any reasonable doubt on the prosecution's case. Accordingly, the appellants were found guilty of the charge and sentenced to mandatory death.

THE APPEALS

[18] The appellants' main thrust of argument was that the prosecution had failed in its duty to promote a fair trial to the severe prejudice of the appellants. Submissions as regards this issue was mainly made by learned counsel for the first appellant, which was adopted by learned counsel for the second appellant. In this respect, learned counsel for the first appellant relied on the dicta of the Federal Court in *Rosli bin Yusof v Public Prosecutor* [2021] 4 MLJ 479; [2021] 7 CLJ 681, where it was held that prosecutors have a duty to present their case fairly, impartially and professionally and to assist the court in arriving at the truth by producing all the relevant facts, and this would include making available to the defence important witnesses who have been investigated and from whom statements have been recorded by the police.

[19] In *Rosli bin Yusof*, the Federal Court recognised that the right to a fair trial is implied in art 5(1) of the Federal Constitution, and further expounded on the duty of the prosecution to play fair in the following words:

> [29] We begin with the discussion on the proper role of the prosecutor. The prosecutor in a criminal trial occupies a special position. His or her role is unlike the counsel for a party in a civil trial or counsel for the accused. Unlike other clients who have interest in securing a conviction at all costs, prosecutors are often called 'minister of justice' and their role is to present the whole case to the court and assist the court in finding out where the truth lies. Due to their special role in criminal trials, the prosecutors are under several well-defined duties including: (i) duty of disclosure (see s 51A of the CPC); (ii) duty to call all credible and relevant witnesses; and (iii) duty to conduct the case fairly (see *R v Banks* [1916] 2 KB 621 *R v Sugarman* (1985) 25 Cr App R 109 and *Muhammad Kadar and another v Public Prosecutor* [2011] 3 SLR 1205).
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> [30] We would like to emphasise that, at all times, prosecutors are expected to present their case fairly, impartially and professionally and assist the court in arriving at the truth by producing all the relevant facts to the court as 'officer of the court' (see *R v. Guerin* (1931) 23 Cr App R 39).
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> [31] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312; [2010] 4 AMR 292 (FC), this court observed at (p 331 (MLJ); p 310 (AMR)):
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> > The right to a fair trial is of course a universal principle. It is inviolable.
> >
> > The same case quoted with approval a passage from the judgment of Mohd Zawawi Salleh JC (now FCJ) in *Public Prosecutor v Mohd Fazil bin Awaludin* [2009] 7 MLJ 741; [2009] 2 CLJ 862, which reads:
> >
> > > The principle of a fair trial is sacrosanct in all civilised legal jurisdictions. It is a principle of universal application. In Malaysia, the principle of fair trial and fairness have been long established and recognised in several decisions.

[20] Learned counsel for the first appellant further submitted that the following four persons were important witnesses for the defence:

(a) Roxan;

(b) Sia Oh Bong;

(c) Lin Wen Hua; and

(d) Chen Heng Tai,

and that the prosecution's conduct in respect of their availability to appear in court as witnesses who had been offered by the prosecution to the defence, as well as the prosecution's refusal to provide the s 112 Criminal Procedure Code ('the CPC') statements of these persons and the corresponding rulings made by the learned trial judge rejecting the appellants' application for copies of s 112

statements recording from these witnesses had prejudiced their rights to a fair trial.

ISSUES RELATING TO OFFERED WITNESSES

Roxan

[21] Roxan was an employee of the hotel. The appellants submit that she was an important witness for the defence to establish or corroborate some aspects of the defence case. Roxan was present at the reception counter at the time of the police raid. She was the person who handed the key to room 203 to SP5 on 20 August 2016. SP5 then gained access to the said room. She would have also known who had occupied room 203 at the material time.

[22] Learned counsel for the first appellant submitted that the importance of Roxan as a witness for the defence can be gleaned from the following pieces of evidence:

(a) the first appellant had in his written statement that was tendered as evidence said that on 16 August 2016 he instructed Roxan to give the key to room 203 to Chen Heng Tai (one of the two Taiwanese) as Chen Heng Tai had requested an additional room. The first appellant further stated in his written statement that Roxan had received from Chen Heng Tai a complaint that the TV in room 203 was not functioning following which the first appellant had entered room 203 on two occasions on 19 August 2016 to repair the TV cable; and

(b) SD3 (Chia Huey Mian) testified that whilst she was at the reception counter she overheard a Taiwanese guest complaining to Roxan that the TV in his room was not functioning.

[23] Hence, learned counsel for the first appellant submitted that if Roxan was called as witness, she would be able to confirm the following aspects of the first appellant's defence:

(a) that the first appellant had instructed her to give the key to room 203 to Chen Heng Tai as he needed an additional room; and

(b) that Chen Heng Tai, the Taiwanese guest, had complained to her that the TV in room 203 was not functioning,

and that these aspects of Roxan's evidence will strengthen the first appellant's explanation and innocence with regard to the first appellant's entry to room 203 on two occasions on 19 August 2016.

[24] The Investigation Officer (SP8) had confirmed that a s 112 CPC statement was recorded from Roxan. SP8 also admitted that Roxan was an

important witness. The prosecution had at the close of prosecution case offered Roxan as a witness to the defence, which was accepted by both the appellants. However, subsequently that offer was withdrawn as Roxan had returned to the Philippines, her country of origin. The prosecution refused the defence request for Roxan's s 112 CPC statement.

[25] Learned counsel for the first appellant had then urged the High Court to order production of Roxan's s 112 CPC statement and for the court to invoke adverse presumption under s 114(g) of the Evidence Act for their failure to do so. However, the learned trial judge dismissed that request. We agree with submissions of learned counsel for first appellant that this was a serious misdirection by the learned trial judge as the production of Roxan's s 112 statement has probative value for the defence in that it could have:

(a) corroborated the first appellant's testimony that it was the first appellant who instructed her to give the key to room 203 to Chen Heng Tai;

(b) corroborated the first appellant's version that Chen Heng Tai of room 203 had complained to her that the TV in the room was not functioning and that she had informed the appellant about it; and

(c) consequently, negate possession of the drugs or common intention between him and the second appellant to commit the offence.

[26] We agree, for reasons discussed below, that the prosecution's refusal to give the s 112 CPC statement to the defence and the High Court's dismissal of the defence application for the production of the same has severely prejudiced the defence, and the appellants have been deprived of a fair trial.

Sia Oh Bong

[27] Sia Oh Bong was also a witness offered by the prosecution to the defence. The defence had wanted Sia Oh Bong as witness for their case. However, when the time came for the defence case to proceed, the prosecution was unable to locate Sia Oh Bong. SP8 was recalled by the prosecution to explain why Sia Oh Bong could not be physically produced. SP8 then confirmed that a s 112 CPC statement was recorded from Sia Oh Bong. Again the defence wanted Sia Oh Bong's s 112 of the CPC statement as he was not physically produced by the prosecution. This request was refused by the prosecution, and the defence application to the trial court for an order of production of the s 112 statement of the CPC was similarly rejected. The learned trial judge ruled that the defence was not entitled to the s 112 CPC statement based on the Federal Court's pronouncement in *Husdi v Public Prosecutor* [1979] 2 MLJ 304.

[28] We accept the contention of learned counsel for the first appellant that

in the present case, the following facts would distinguish it from *Husdi*, and they:

(a) that Sia Oh Bong was a witness offered by the prosecution to the defence at the close of prosecution case, and could not be located by the prosecution; and

(b) that in *Husdi* the application for the s 112 statements were made before trial and the statements sought were from witnesses who were not offered to the defence; and

(c) the principle of the law in such factual circumstances is as found in the judgment of this court in *Siti Aisyah v Public Prosecutor* [2019] 4 MLJ 46; [2019] 7 CLJ 27.

[29] In *Siti Aisyah* in considering whether it was necessary and desirable for the prosecution to produce the s 112 CPC statements applied for by the appellant, this court held as follows:

> [42] In Brunei, the leading case on point is the Court of Appeal decision in *Yeo Tse Soon & Anor v Public Prosecutor* [1995] 3 MLJ 255; [1995] 2 CLJ 179. The trial judge had rejected the appellant's application for the prosecution to produce a statement made by one Lau Foo Tze ('Lau') to the police on the ground that it was open to the defence to call him as a defence witness. *The appellant believed that this Lau's statement contained material which could exonerate him. The statement became necessary as Lau had disappeared by the time the trial had commenced and could not be traced.*
>
> [43] On appeal, the Brunei Court of Appeal, after analysing the common law, adopted the approach in the United Kingdom that *only if there are good reasons for withholding a statement should the prosecution refuse to disclose it and make it available. The court held that a material irregularity had occurred through a wrong exercise by the judge of this discretion in refusing to order production*.
>
> ...
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> [53] On this score as well, this court in *Public Prosecutor v Asnawi bin Yusuf* [2011] 4 MLJ 16; [2012] 3 CLJ 41 held that when witnesses were offered to the prosecution by the defence, it was the bounden duty of the prosecution to avail those witnesses for the defence. If in the exercise of that duty, the prosecution failed to fulfil that obligation, the accused must be acquitted. The court observed (at p 24 (MLJ); p 49 (CLJ)):
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> > [22] Learned defence counsel gave ample warning to alert the court and especially to the learned deputy public prosecutor that it was his intention to call those witnesses including but not limited to M Dahlan, Edy Shahputra and Abdul Rahman.
> >
> > [23] Now, perhaps curiously, when learned defence counsel wanted the above named three witnesses to testify, the public prosecutor said that all of them were not available. The reason proffered was that they cannot be traced as they are Indonesians! Such reason is simply untenable and indefensible particularly in a

A case involving the liberty of an individual. We have provisions in our laws to ensure that this would not have happened. *It is clear law that when witnesses are offered by the prosecution to the defence at the end of the case for the prosecution, it is the bounden duty of the prosecution to avail these witnesses for the defence. If in the exercise of this duty, the prosecution fails to fulfill this obligation, the accused must be*
B *acquitted.*

[54] In *Pragalathan a/l Balakrishnan v Public Prosecutor* [2018] 3 MLJ 818; [2018] 2 CLJ 420, *this court also noted that if the prosecution had told the trial judge that a particular witness offered to the defence cannot now be located, the prosecution could have at least provided the s 112 CPC statement to the defence so that they could then have*
C *some opportunity to deal with it or even introduce it into evidence if the law permitted it.*

[55] In this context as well, this court in *Kobra Taba Seidali v Public Prosecutor* [2014] 2 MLJ 554; [2014] 2 CLJ 12 had occasion to hold that *failure of the prosecution to produce the witness or hand over a copy of the witness statement to the*
D *defence to be used by the defence at the defence stage was fatal on the factual matrix of that case.*

[30] Further, in *Masoumeh Gholami Khaveh v Public Prosecutor* [2013] 5 MLJ 688; [2013] 5 CLJ 59 in similar circumstances to this case where the
E prosecution was unable to produce an offered witness who was accepted by the defence, Azahar Mohamed JCA (as he then was) speaking for the Court of Appeal made the following pronouncement:

[16] Against the backdrop of the above, five important points should now be highlighted here. First, the appellant has forwarded a defence of innocent carrier in
F that she never at anytime denied that she carried the two bags but disputed having knowledge of the drugs hidden in them. Secondly, the existence and involvement of Amin in this case cannot be disputed. Thirdly, at the close of the prosecution's case, the prosecution offered Amin but could not make him available at the trial. Fourthly, the appellant's counsel at the trial had informed the prosecution that he
G intended to call Amin as a defence witness. Fifthly, the testimony of Amin might well have established that the appellant had no prerequisite knowledge of the drugs hidden in the two bags.

[17] Therefore, under such circumstances, in our judgment, the pertinent issue which the learned trial judge had to decide was whether the appellant's right to a fair
H trial had been compromised. In this regard, the learned trial judge had this to say in her grounds of judgment:

In the case before me, the prosecution need not rely on Amin at all and it was the defence that required him. Therefore Amin's absence had not injured or prejudiced the prosecution's case. Further, Amin was not 'important and
I material witness' as stated in the case.

[18] *In our judgment, in the context of the present case, this is a serious misdirection. Even though Amin was not an important witness in the unfolding of the narrative of the prosecution's case, that did not relieve the learned trial judge from determining whether Amin was in point of fact an important and material witness as far as the defence was*

concerned. The learned trial judge misdirected herself in that she overlooked and failed to appreciate the importance of Amin to the defence's case as he was the one who could raise a reasonable doubt on the prosecution's case. This was never considered by the learned trial judge. In the light of this unsatisfactory feature, in our judgment, the appellant had been seriously prejudiced. *In Public Prosecutor v Asnawi Yusuf* [2011] 4 MLJ 16; [2012] 3 CLJ 41*, this court held that it is the bounden duty of the prosecution to secure the attendance of witnesses once they were offered as witnesses to the defence. Likewise, in the present case the prosecution has the bounden duty to secure the attendance of Amin. The appellant may waive the attendance of Amin. It is true that if Amin was produced in court, he might not be able to give favorable evidence for the appellant, but that did not detract from the prosecution's duty to produce him in court. The appellant cannot be deprived of Amin's attendance in order to prove her innocence.*

[19] *In our judgment, on the facts and the prevailing circumstances of this case, the appellant's right to a fair trial has been compromised as a result of the failure on the part of the prosecution to secure the attendance of Amin, which has the effect of rendering the conviction very unsafe. The appellant may thereby have lost a chance which was fairly opened to her of being acquitted and that there had been occasioned a failure or a miscarriage of justice* (see: *Mraz v The Queen* [1955] 93 CLR 493 quoted with approval in *Lim Hock Boon v Public Prosecutor* [2007] 1 MLJ 46; [2007] 4 CLJ 114). This appeal was, therefore, allowed on this ground alone. Accordingly, we quashed and set aside the conviction and sentence against the appellant. The appellant was acquitted and discharged.

Likewise, in *Public Prosecutor v Asnawi bin Yusuf* [2011] 4 MLJ 16 this court had ruled in a similar manner when a number of offered witness were not produced by the prosecution when required by the defence then the accused must be acquitted.

[31] This principle was reiterated by the Federal Court in *Rosli bin Yusof*. In that case the core issue concerned the duty of the prosecution to make available any witness whose evidence may assist an accused. The Federal Court said:

[1] The central issue in this appeal concerns the duty of the prosecution to make available to the defence any witness whose evidence may assist the accused in his or her defence. Specifically, the appellant asks this court to determine the following questions of law:

(i) whether the prosecution has a duty to make available to the defence witnesses who had been investigated by the police and from whom statements had been recorded; and

(ii) if there is such duty, what are the consequences of the failure of the prosecution to uphold this duty.

...

[46] Before parting, *we consider it apposite to emphasise that a person's right to defend himself or herself against a criminal charge includes the right to obtain and adduce other evidence in support of his or her defence. It is desirable in the interest of justice for the defence to obtain the fullest possible access to the facts relevant to the issue in the case. In this regard, the prosecution has a duty to make available to the defence witnesses who had*

been investigated by the police and from whom the statements have been recorded. This is, as we alluded to earlier, an important or vital corollary or element of an accused's right to a fair trial.

[32] Hence, the law is very clear. The case of *Husdi* concerned an application before commencement of trial for the police statements. However, when an application for the s 112 CPC statement is made at the close of the prosecution's case or at the defence stage when an offered witness cannot be located or produced in court, then different consideration would apply, as can be seen from the cases cited above, namely *Pragalathan a/l Balakrishnan v Public Prosecutor* [2018] 3 MLJ 818; [2018] 2 CLJ 420 and *Kobra Taba Seidali v Public Prosecutor* [2014] 2 MLJ 554; [2014] 2 CLJ 12. The ratio decidendi of these cases are on point with the issue in the present case. Such an application can be considered and allowed by the court especially if any witnesses offered by the prosecution cannot be located or subpoenaed to attend court.

Lin Wen Hua and Chen Heng Tai

[33] Both Lin Wen Hua and Chen Heng Tai are the two Taiwanese suspects who were arrested together with the appellants but were subsequently released and allowed to return to Taiwan.

[34] It was the defence of the appellants that the two trolley bags containing the drugs belonged to both Lin Wen Hua and Chen Heng Tai, and that Chen Heng Tai was the actual occupant of room 203 at the time of the police raid. And in this regard, the first and/or second appellants had put to the Investigation Officer (SP8) the following aspects of their case:

(a) that the arrests made in this case were made in collaboration with the Taiwan Bureau of Justice Investigation, which was confirmed by SP8;

(b) that three Taiwanese were arrested, amongst whom were Lin Wen Hua and Chen Heng Tai, which was agreed to by SP8;

(c) that both Lin Wen Hua and Chen Heng Tai were guests of Victory Exclusive Hotel, which SP8 agreed to;

(d) that the reason why the first appellant entered room 203 on 19 March 2016 was to repair the TV cable;

(e) that drugs were only found in the two bags marked as exhs P16 and P17, and that the first appellant did not handle any of these bags, to which SP8 agreed;

(f) that the first appellant brought a bag (P18) to room 203 which did not contain drugs, which was agreed to by SP8; and

(g) that LLPK (preventive detention) were taken against both appellants commencing 24 October 2016 and both the appellants were charged in court for drug trafficking some 17 months later.

[35] The following aspects of the first appellant's case were put to SP5, lead raiding/arresting officer:

(a) that no personal belongings of the first appellant were found in room 203, which SP5 confirmed; and

(b) that the two bags of drugs found in room 203 were in the possession of Lin Wen Hua.

[36] It is a requirement of the law that in order to prove its case beyond reasonable doubt, the prosecution must negate the defence case. This was reiterated by the Federal Court in *Aedy bin Osman v Public Prosecutor* [2018] supp MLJ 353; [2011] 1 CLJ 273 in the following terms:

> ... it is incumbent upon the prosecution to call evidence to rebut any claim which is relevant and material by the defence in the course of cross-examination of the prosecution witnesses than risking dismissal of its case for want of proof.

Similarly this court had in *Ooi Chee Seong & Anor v Public Prosecutor* [2014] 3 MLJ 593; [2014] 7 CLJ 505 observed:

> [42] This would be followed by the case of *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649, a decision of Augustine Paul J (later FCJ). There His Lordship aptly said at p 731 (MLJ); p 676 (CLJ) of the report:
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> > As the prosecution has failed to negate the suggestions made by the defence in the course of its case it may still rebut the defence advanced by cross-examination of the accused and his witnesses and/or, if possible, by calling Yee Chin Koon as a witness or tendering his police statement in evidence by re-opening its case at the end of the case for the defence.
>
> [43] James Foong FCJ in *Aedy bin Osman v Public Prosecutor* [2018] supp MLJ 353; [2011] 1 CLJ 273, at p 283, writing for the Federal Court expressed the same sentiments:
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> > From the authorities cited by the appellant's counsel, it is incumbent upon the prosecution to call evidence to rebut any claim which is relevant and material by the defence in the course of cross-examination of the prosecution witnesses than risking dismissal of its case for want of proof.

[37] However, despite the challenges mounted and suggestions made by the defence in respect of the gaps in the prosecution's case, particularly as to the role of Roxan, Sia Oh Bong, Lin Wen Hua and Chen Heng Tai, during the unfolding of the prosecution's narrative, and the need for the prosecution to negate or rebut the defence narrative put or suggested to several of the prosecution's important witnesses, the prosecution did not call any of these

four witnesses to negate the same or tender their s 112 CPC statements at the trial to throw some light on these assertions by the defence.

[38] The suggestions by the defence that the masterminds behind the drugs were Lin Wen Hua and Chen Heng Tai, and that Chen Heng Tai had taken room 203 as an additional room in which the drugs were found were never effectively dispelled by the prosecution. Roxan's evidence would also have been material and relevant to dispel the defence contention that Chen Heng Tai who was said to be occupying room 203 had complained about the faulty TV and that the first appellant had entered that room twice to repair the TV cable. However, Lin Wen Hua and Chen Heng Tai were both sent back to Taiwan, and Roxan was allowed to return home to the Philippines. Nevertheless, no attempts were made to try and bring them back to Malaysia to testify at the trial.

[39] There is uncontroverted evidence that statements were recorded from these persons by the police but these statements were not produced by the prosecution to close these gaps in the case for the prosecution. Neither were these statements tendered or supplied to the defence, even when the above four persons who were important witnesses for the defence were unavailable in Malaysia. The defence may have had use for these statements if they contained any averments corroborating their version of events.

[40] The failure of the prosecution to provide these statements to the defence and the refusal of the trial court to order their production has severely prejudiced the defence and denied the appellants their right to a fair trial. This is especially so when the appellants were both initially detained under the preventive detention laws for some 17 months before being charged with the offence of trafficking. The passage of such a long time from their arrest to charge had resulted in some of the material witnesses being not available. This handicap to the defence could have been remedied if the prosecution had provided the s 112 CPC statements of these individuals to the defence, or the prosecution themselves tendered these statements to court to negate the defence case as suggested to the prosecution witnesses. Alas, this was not done, and we are of the view that, in the circumstances of the facts of the case, the prosecution has failed to discharge its duty to call all credible and relevant witnesses; and had also failed in its duty to conduct the case fairly.

[41] Further, fingerprint dusting was done by the police forensics team on all the exhibits seized from the hotel including the two trolley bags containing the drugs. Out of the 17 fingerprints lifted, 11 were from room 203, and none of them matched the appellants' fingerprints. This lends credence to the defence claim that:

(a) the first appellant was not occupying room 203 and that he had opened

room 203 with the room key on 18 August 2016 at about 9.57 pm for the second appellant who was carrying one of the trolley bags (P16) into the room. The first appellant had entered room 203 again on 19 August 2016 on two occasions, the first for three minutes at about 2.15pm and the second for about 34 minutes at 9.42pm. The first appellant said that it was to first check on the faulty TV in the room and then to repair it; and

(b) the second appellant had carried one of the trolley bags (P16) into room 203 on 18 August 2016 at about 9.57pm entered room 203 for about two minutes at 9.56pm, and that this was done at the behest of Chen Heng Tai.

[42] These were the evidence that was established through the CCTV recording in the hotel that was tendered by the prosecution. Now, if the appellants, and in particular the first appellant had been occupying room 203, then surely their fingerprint would have been found on the two luggage bags and other items in the room that any hotel guest would have ordinarily used. However, none were found.

[43] Further, the second appellant had entered room 203 only once, that is on 18 August 2016 for a fleeting two minutes. The prosecution's case against the second appellant was based solely on the CCTV footage. The second appellant was occupying room 209, and that is where he was arrested. A search of room 209 was done but nothing incriminating was found there. Apart from the second appellant seen carrying one of the trolley bag (P16) into room 203 on 18 August 2016 there is no other evidence connecting the second appellant to the first appellant and/or the drugs found in the said room.

[44] SP8 who reviewed the CCTV recording for all the relevant dates said that after the two trolley bags were brought into room 203, the second appellant did not enter room 203 at all after that. Now, this evidence at most shows momentary custody of the bag (P16) by the second appellant. Is that sufficient to establish common intention with the first appellant under s 34 of the Penal Code? When the facts and circumstances of the case is considered, we think not. Momentary custody of luggage bag (P16) by taking it into room 203 and living it there without any further contact with until it was found and seized by the police two days later is in our opinion not sufficient to prove the basic elements of custody and control, let alone knowledge of the drugs inside the bags. As was observed by Lord Morris in *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 at p 290:

> ... If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains — then, ordinarily, I would suppose that there would not be possession.

A **[45]** Now, considering the fact that the prosecution's case is based solely on the fact that the second appellant was seen carrying the trolley bag (P16) and entering room 203, and in light of the second appellant's defence that the luggage bag belongs to Chen Heng Tai, and that he had carried the trolley bag (P16) to room 203 at the request of Chen Heng Tai, and that he did not know
B the contents of the bag, it is imperative that the prosecution negate this defence of the second appellant. This evidence of the second appellant was corroborated by the first appellant and SD1 (Kelly Chia) where according to them, three days before their arrest, Chen Heng Tai had rented room 203. In the absence of Chen Heng Tai who was allowed to return to Taiwan, without
C any Bond under s 118 of the CPC to secure his appearance as a witness, if and when required, the next best evidence to negate this defence contention would have been Chen Heng Tai's s 112 statement that was recorded by the police to be tendered in evidence or offered to the defence.

D **[46]** The evidence clearly shows that Chen Heng Tai is material and essential to the unfolding of the narrative of the whole case, or at the very least to negate the defence case bearing in mind that he was also arrested together with the appellants but released subsequently. The failure to do so would warrant the invoking of adverse inference under s 114(g) of the Evidence Act. See:
E *Masoumeh Gholami Khaveh v Public Prosecutor* [2013] 5 MLJ 688; [2013] 5 CLJ 59.

[47] Thus, we agree with submissions of counsel for the appellants that the learned trial judge had misdirected himself in dismissing the explanation of the
F appellants, and dismissing their application for the production of the s 112 CPC statements of these four persons, and in failing to invoke adverse inference against the prosecution for not producing Chen Heng Tai, and/or the other three persons or their s 112 CPC statements.

G **[48]** Therefore, in the overall we find that the appellants' conviction is not safe and accordingly the appeals are allowed and the conviction and sentence as ordered by the High Court are set aside. Both appellants are acquitted and discharged.

H *Appeals allowed; order of High Court set aside; appellants acquitted and discharged.*

Reported by Dzulqarnain Ab Fatar

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